80-553

Supreme Court, U. S.
FILED
OCT 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 79-2249, et seq.

RONALD DEMANETT, et al.,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GERALD B. LEFCOURT
Attorney for Ronald Demanett
148 East 78th Street
New York, New York 10021
(212) 737-0400

STEVEN J. HYMAN
Attorney for Charles Gombrewicz
148 East 78th Street
New York, New York 10021
(212) 737-0400

JAMES DOWD
Attorney for Pennell Odell, Jr.
295 Bloomfield Avenue
Caldwell, New Jersey 07006
(201) 226-3060

STEVEN A. STUPAK
Attorney for Clemente Castillo-Yepes
800 N. Kings Highway
Suite 503
Cherry Hill, New Jersey 08034
(609) 779-1797

THEODORE WELLS, JR.
Attorney for Ernesto Guerrero-Chaguay
744 Broad Street
Newark, New Jersey 07102
(201) 624-4600

RICHARD WARE LEVITT,
Of Counsel

Question Presented

May the Coast Guard, consistent with the Fourth Amendment, seize and board an American vessel five miles from shore when circumstances indicate only that it is a vessel in transit?

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutes, Federal Rules and Regulations Involved	2
Statement of Case	2
A. The Facts	2
Reasons for Granting the Writ	6
Argument	6
Conclusion	10
Appendix A, The Opinion of the Third Circuit Court of Appeals	1a
Appendix B, The Judgment Affirming Sentence of the Third Circuit Court of Appeals	18a
Appendix C, Order of Third Circuit Court of Appeals Denying Petitioners' Petition for Rehearing	20a

Table of Authorities

Brown v. *Texas*, 443 U.S. 47, 99 S.Ct. 2637 (1979).. 6, 7, 8

Delaware v. *Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979) 7, 9, 10

United States v. *Conroy*, 589 F.2d 1258 (5th Cir.), *cert. denied*, —— U.S. ——, 100 S.Ct. 60 (1979) 9

United States v. *Dominquez*, 604 F.2d 304 (4th Cir. 1979), *cert. denied sub nom. Sarmiento* v. *United States*, —— U.S. ——, 100 S.Ct. 664 (1980) ... 9

PAGE

United States v. *Ingham*, 502 F.2d 1287 (5th Cir.), *cert. denied*, 421 U.S. 911 (1975) 9

United States v. *Kleinschmidt*, 596 F.2d 133 (5th Cir. 1979), *cert. denied*, —— U.S. ——, 100 S. Ct. 267 (1979) 9

United States v. *Postal*, 589 F.2d 862 (5th Cir.), *cert. denied*, —— U.S. ——, 100 S.Ct. 6 (1979) .. 9

United States v. *Weinrich*, 586 F.2d 481 (5th Cir. 1978), *cert. denied*, 441 U.S. 927 (1979) 9

United States v. *Williams*, 617 F.2d 1063 (5th Cir. 1980) (*en banc*) 8, 9

STATUTES CITED

Constitution of the United States

Fourth Amendment 2, 6, 9

28 U.S.C. § 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 79-2249, et seq.

RONALD DEMANETT, et al.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Gerald B. Lefcourt, on behalf of Petitioners Ronald S. Demanett, Pennell L. Odell, Jr., Ernesto Bolivar Guerrero-Chaguay, Clemente Castillo-Yepes, and Charles P. Gombrewicz, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on the 28th day of July, 1980.

Opinion Below

The opinion of the Third Circuit Court of Appeals has not yet been reported. A copy thereof is annexed to this Petition as Appendix A.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was made and entered July 28, 1980, and a copy thereof is appended to this Petition as Appendix B. An order denying Petitioners' Petition for Rehearing was entered on September 4, 1980, and a copy thereof is appended to this Petition as Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

May the Coast Guard, consistent with the Fourth Amendment, seize and board an American vessel five miles from shore when circumstances indicate only that it is a vessel in transit?

Statutes, Federal Rules and Regulations Involved

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case

A. The Facts

During the afternoon hours of March 2, 1979, the United States Coast Coast Guard cutter POINT FRANKLIN encountered a vessel identified by markings as the KRISTEN JANE, Charleston, S.C., as the latter vessel was within five miles

of, and headed towards, Delaware Bay (H.T. 19, 20, 27).[1] The Commanding Officer of the POINT FRANKLIN, Lieutenant John H. Olthius, noticed that the KRISTEN JANE was travelling slowly—two to three knots—and that its fishing gear was both unusual for the area and not in recent use (H.T. 22-24).[2]

His suspicions aroused, Olthuis contacted Group Cape May and requested an EPIC (El Paso Information Center) check be conducted to ascertain whether the KRISTEN JANE was a suspect vessel (H.T. 29). At this time, the POINT FRANKLIN continued eastward one or two miles past the KRISTEN JANE and then turned around. Shortly thereafter the Cape May station contacted the POINT FRANKLIN and the following conversation ensued:

> Cape May: Roger, we've checked all our (lists) we come up negative. EPIC comes up negative also.
>
> Pt. Franklin: Roger, chief, I've just got a feeling about this guy, he's out of South Carolina. I've never seen him down in this area before. Uh, he's on a real slow [bell/speed] into Delaware Bay; uh, I don't know, I just don't know where he would be going.
>
> Cape May: Uh, Pt. Franklin, this is Group Cape May. If you have any doubts, why don't you go ahead and board them and see maybe you got a problem because you're proceeding so slowly.

(A. 145).

---

[1] The letters "H.T." refer to the numbered pages of Volume One of the transcript of the suppression hearing conducted on June 12, 1979, before the Honorable John F. Gerry, U.S.D.J., District of New Jersey, and reprinted in full in the Appendix following page A. 37. Except where otherwise noted, record references are to the testimony of witness John H. Olthuis.

[2] Olthuis further noted that the KRISTEN JANE was travelling in the separation lane between the incoming and outgoing traffic lanes, a fact to which he attributed no significance (H.T. 77-81, 167).

Olthuis conceded on cross-examination that, Cape May's suggestion notwithstanding, he had not decided to board the KRISTEN JANE to ascertain whether she was having problems, but rather "to see whether [the KRISTEN JANE] was doing something illegal" (H.T. 101-02).

Upon establishing radio contact with the KRISTEN JANE, Olthuis informed defendant Odell of their intention to board, and, without further explanation, ordered Odell to proceed into the calmer waters of the Delaware Bay.[3] At some point after the KRISTEN JANE had stopped in preparation for the ordered boarding, Petty Officer Cornell noticed that the name "KRISTEN JANE" was not permanently affixed to the vessel, but rather was written on a placard hung over the stern (H.T. 46, 130-32; Strickland: H.T. 173). This information was relayed to Lieutenant Olthuis through Petty Officer Strickland after the KRISTEN JANE had been boarded (A. 146).

As the POINT FRANKLIN continued its approach, the KRISTEN JANE unexpectedly went into reverse and the POINT FRANKLIN did the same in order to avoid a collision. Defendant Odell explained via radio that the KRISTEN JANE had temporarily locked into reverse, and Olthuis did not attach any significance to this incident (H.T. 48, 49; Strickland: H.T. 174).

When the vessels rendezvoused, Petty Officers Strickland and Cornell, both armed with sidearms, boarded the KRISTEN JANE and Olthuis backed the POINT FRANKLIN down forty to sixty yards therefrom to observe the progress of the boarding party (H.T. 45, 49A, 50). Once aboard, Petty Officer Strickland informed defendant Odell that he was boarding to assure "compliance with applicable federal law." (Strickland: H.T. 176).

---

[3] The calm water boarding was necessary for safety reasons because the POINT FRANKLIN's "Zodiac" boarding boat was inoperable and the boarding therefore had to be accomplished ship to ship (H.T. 42).

Strickland, defendant Odell and defendant Demanett proceeded to the wheelhouse at which time Odell told Strickland that there was a third person on board, defendant Gombrewicz, who was in the mess deck, just aft of the wheelhouse (Strickland: H.T. 176). Odell informed Strickland that the KRISTEN JANE was en route to a Caterpillar representative in Philadelphia (Strickland: H.T. 177, 193). Upon being informed by Odell that he did not have the KRISTEN JANE's documentation papers with him, Strickland asked to go into the hold, ostensibly to look for the documentation number (Strickland: H.T. 177, 179). (In fact, the documentation number was in the engine room [H.T. 185-86].) Odell and Demanett opened the hatch door leading to the hold per Strickland's instructions and Strickland observed therein a large quantity of a substance which looked like—and was later determined to be—marijuana (Strickland: H.T. 180-180A, 183). Odell and Demanett were immediately read their rights and placed under arrest (Strickland: H.T. 182).[4]

Defendant Gombrewicz was brought from the wheelhouse to the fantail and he there advised Petty Officer Cornell that there were others aboard (Strickland: H.T. 182). Seven Spanish speaking persons were located in the aft part of the deckhouse (Strickland: H.T. 182, 186). The KRISTEN JANE was towed to Cape May (H.T. 55; Strickland; H.T. 183).

The above facts formed the basis for the defendants' motion to suppress evidence. This motion was denied by the District Court after a hearing and extensive briefing and argument. The denial of this motion formed the sole basis for appeal to the Circuit Court of Appeals, and forms the sole basis for certiorari review.

---

[4] Approximately two hours elapsed from the time of the seizure to the discovery of the contraband.

REASONS FOR GRANTING THE WRIT

Argument

This case raises fundamental issues concerning the application of the Fourth Amendment to searches and seizures at sea, issues which the court below acknowledged to be "a matter of serious debate" within the Circuits and amongst the commentators.[5]

The facts *sub judice* are simple and direct, the questions of law are basic and profound. The KRISTEN JANE was seized and boarded for no other reason than that it appeared to be in transit; she hailed from South Carolina, had rigging which was not of the type used by local fisherman, and did not appear to have recently been fishing. In this regard, the instant facts are qualitatively indistinguishable from those in *Brown* v. *Texas*.[6]

In *Brown*, two police officers cruising in their patrol car observed the defendant and another man walking in opposite directions in an alley within an area known for its high incidence of drug use. One of the two officers testified that they believed the suspects had been together or were about to meet until the patrol car appeared. The officer testified that he had stopped the defendant because the situation "looked suspicious and we have never seen the subject in that area before."[7]

Upon the foregoing facts the seizure of the defendant was held by this Court to have been unlawful: "The flaw in the State's case is that none of the circumstances preceding the officers' detention of appellant justified a reasonable suspicion that he was involved in criminal con-

---

[5] Slip op. at 17a n. 4.

[6] 443 U.S. 47, 99 S.Ct. 2637 (1979).

[7] 99 S.Ct. at 2639.

duct. * * * When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits. See *Delaware* v. *Prouse, supra,* 99 S.Ct. at 1401.'"[8]

The holding in the instant case simply cannot be squared with this Court's unanimous decision in *Brown.* Indeed, although Petitioner relied heavily on *Brown* in the Circuit Court, that Court did not even mention, let alone attempt to distinguish, that case. The Circuit Court simply found that the facts, which indicated no more than a ship in transit, rose to the level of articulable suspicion to believe the KRISTEN JANE "may [have been] engaged in activity for which it [was] not properly documented."[9] What that "activity" may have been was not explicated.[10]

---

[8] *Id.* at 2641.

[9] Slip op. at 17a.

[10] Despite the reluctance of the District Court to so hold, the hearing record is replete with evidence that the primary, if not only reason why the KRISTEN JANE was boarded was to search for the fruits of smuggling activity, rather than to merely ascertain whether the vessel had proper documentation. For instance, the Appendix to Petitioner-Appellants' brief in the Circuit Court contains numerous references to the Coast Guard's Operational Plan and Boarding Manual, portions of each of which explicitly, endorse a policy of "subterfuge," aimed at conducting warrantless criminal investigatory searches under various guises, as, for example, looking for the ship's documentation number in the hold or searching the entire vessel to look for "safety violations." (A. 175, 177, 186-86).

Indeed, when Lieutenant Olthuis communicated his suspicions to Group Cape May, the Group suggested the boarding be accomplished on the pretext of determining whether the KRISTEN JANE was in need of assistance (A. 145). Olthuis agreed, however, that safety concerns had nothing whatever to do with the boarding (H.T. 105-07) and conceded, after admitted reluctance (H.T. 102), that the actual reason for the boarding was "to see whether [the KRISTEN JANE] was doing something illegal." (H.T. 101-02).

(footnote continued on following page)

Of course there *is* a basic difference between *Brown* and this case. *Brown* involved the arrest of a single person, and the ensuing searches of the arrestee disclosed nothing untoward. Here, by contrast, an entire vessel and her crew were seized and more than ten tons of marijuana were found. Application of the maxim "bad facts make bad law" could never be more appropriate.

This case is one of dozens which have been decided within the last few years involving searches and seizures of ocean-going vessels. As noted above, these cases betray complete confusion among and within the Circuits.[11] For example, the most recent of the several attempts by the Fifth Circuit to clarify its hopelessly tangled web of precedent propounded principles which one of the concurring judges charitably characterized as "obscure."[12]

Nor is there any end in sight, short of clarification of the applicable law by this Court. Several cases involving vessel searches have been presented to this Court for certiorari review of late, but none has been accepted. Many of them, however, were complicated by complex questions

---

(footnote continued from preceding page)

Additionally, one of the first things Olthuis did upon sighting the KRISTEN JANE was to request that an "EPIC" computer check be conducted to determine whether the KRISTEN JANE was a suspect vessel. At this same time, Olthuis maneuvered the POINT FRANKLIN past the KRISTEN JANE in a manner similar to that which is utilized by the Coast Guard to feign disinterest in a suspect vessel (H.T. 83-84).

[11] *See* n. 1, *supra.*

[12] *United States* v. *Williams,* 617 F.2d 1063, 1094 n. 3 (5 Cir. 1980) (*en banc*) (Rubin, J., concurring).

of international or maritime law,[13] whereas others were arguably decided correctly upon accepted principles of Fourth Amendment jurisprudence.[14]

The instant case, however, presents questions unburdened by complex facts or multiple issues, and the holding below cannot be reconciled with the Court's precedents.

Judge Rubin of the Fifth Circuit accurately stated the correct rule in such cases when he opined, "The Constitution is not to be interpreted in the alternative like the signals from *Paul Revere's Ride:* 'one if by land, and two, if by sea.' "[15] In *Delaware* v. *Prouse*,[16] where this Court disapproved vehicular stops in the absence of articulable suspicion, it was said:

---

[13] *See, e.g., United States* v. *Dominquez*, 604 F.2d 304 (4th Cir. 1979) (permission received from Commonwealth of Bahamas to board and seize vessel claiming Bahamian registry), *cert. denied sub nom. Sarmiento* v. *United States*, —— U.S. ——, 100 S.Ct. 664 (1980); *United States* v. *Postal*, 589 F.2d 862 (5th Cir.) (foreign vessel seized beyond the 12-mile limit), *cert. denied*, —— U.S. ——, 100 S.Ct. 61 (1979); *United States* v. *Conroy*, 589 F.2d 1258 (5th Cir.) (probable cause search of American vessel in Haitian waters), *cert. denied*, —— U.S. ——, 100 S.Ct. 60 (1979); *United States* v. *Ingham*, 502 F.2d 1287 (5th Cir.) (customs search of vessel arriving from foreign port), *cert. denied*, 421 U.S. 911 (1975).

[14] *See, e.g., United States* v. *Kleinschmidt*, 596 F.2d 133 (5th Cir. 1979) (articulable suspicion found: ocean-going vessel with altered water line riding low in water; cabin was dark; windshield covered with canvas; vessel on suspect vessel list; occupants refused to respond to inquiries), *cert. denied*, —— U.S. ——, 100 S.Ct. 267 (1979); *United States* v. *Weinrich*, 586 F.2d 481 (5th Cir. 1978) (probable cause found: prior information received of pending marijuana boat shipment destined for house already under surveillance pursuant to drug investigation of defendant; vessel at suspect house rendezvoused at night with two other vessels), *cert. denied*, 441 U.S. 927 (1979).

[15] *United States* v. *Williams*, *supra*, 617 F.2d at 1095 (Rubin, J., concurring).

[16] 440 U.S. 648, 99 S.Ct. 1391 (1979).

> Were the individual subject to unfettered government intrusion every time he entered his automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry* v. *Ohio* [392 U.S. 1 (1967)] recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.[17]

Nor, we suggest, are they shorn of those interests when they step foot off the land and onto an ocean-going vessel. For this reason, we ask the Court to grant this Petition for a Writ of Certiorari and reverse the denial of Petitioners' motion to suppress.

Respectfully submitted,

GERALD B. LEFCOURT
Attorney for Petitioner
Ronald Demanett
148 East 78th Street
New York, New York 10021
(212) 737-0400

STEVEN J. HYMAN
Attorney for Petitioner
Charles Gombrewicz
148 East 78th Street
New York, New York 10021
(212) 737-0400

JAMES DOWD
Attorney for Petitioner
Pennell Odell, Jr.
295 Bloomfield Avenue
Caldwell, New Jersey 07006
(201) 226-3060

---

[17] 99 S.Ct. at 1401.

STEVEN A. STUPAK
Attorney for Petitioner
Clemente Castillo-Yepes
Suite 503
800 N. Kings Highway
Cherry Hill, New Jersey 08034
(609) 779-1987

THEODORE WELLS, JR.
Attorney for Petitioner
Ernesto Guerrero-Chaguay
744 Broad Street
Newark, New Jersey 07102
(201) 624-4600

RICHARD WARE LEVITT,
Of Counsel

Appendix A, Opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2249

UNITED STATES OF AMERICA

v.

DEMANETT, RONALD S.

RONALD DEMANETT, *Appellant*

No. 79-2250

UNITED STATES OF AMERICA

v.

O'DELL, PENNELL, JR.,

Appellant

No. 79-2251

UNITED STATES OF AMERICA

v.

GUERRERO-CHAGUAY, ERNESTO BOLIVAR,

Appellant

Appendix A, Opinion.

No. 79-2267

UNITED STATES OF AMERICA

v.

CASTILLO-YEPES, CLEMENTE,

Appellant

No. 79-2292

UNITED STATES OF AMERICA

v.

GOMBREWICZ, CHARLES P.

CHARLES GOMBREWICZ, *Appellant*

(D.C. Crim No. 79-00122-01/02/03/04/06)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued: June 12, 1980

Before: GIBBONS, WEIS and SLOVITER, Circuit Judges

(Opinion Filed July 28, 1980)

ROBERT J. DEL TUFO
United States Attorney
Federal Building
Newark, New Jersey 07101

On the Brief:

KENNETH N. LAPTOOK
Assistant U.S. Attorney

Attorneys for Appellee

GERALD B. LEFCOURT, Esq. (Argued)
148 East 78th Street
New York, New York 10021

Attorney for Ronald Demanett

JAMES DOWD, Esq.
295 Bloomfiield Avenue
Caldwell, New Jersey 07006

Attorney for Pennell O'Dell, Jr.

STEVEN J. HYMAN, Esq.
Hyman & Miner
148 East 78th Street
New York, New York 10021
Attorney for Charles Gombrewicz

STEVEN A. STUPAK, Esq.
800 N. Kings Highway
Cherry Hill, New Jersey 08034
Attorney for Clemente Castillo-Yepes

THEODORE V. WELLS, JR., Esq.
Lowenstein, Sandler, Brochin,
Kohl, Fisher & Boylan
65 Livingston Avenue
Roseland, New Jersey 07068
Attorneys for Ernesto Bolivar Guerrero-Chaguay

RICHARD WARE LEVITT, Esq.
Of Counsel

Attorneys for Appellants

OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

Ronald S. Demanett, Pennell L. O'Dell, Jr., Charles P. Gombrewicz, Ernesto Bolivar Guerrero-Chaguay, and Clemente Castillo-Yepes appeal from judgments of sentence for violations of various statutes prohibiting the importation of marijuana. They contend that the judgments of sentence must be reversed because all the evidence used against them resulted from an unlawful search and seizure, and should have been suppressed.[1] We affirm.

On March 21, 1979, the Coast Guard Cutter POINT FRANKLIN, commanded by Lt. John H. Olthuis, was the Duty Patrol Boat for the Southern New Jersey Coast, the Delaware Coast, and Delaware Bay. At 4:30 p.m. while the POINT FRANKLIN was proceeding east at a point five miles outside Delaware Bay, Olthuis observed to the north a 72 foot white commercial fishing boat, headed westerly into Delaware Bay at a speed of 2 to 3 knots. Approaching to within 150 yards, Olthuis discerned the name KRISTEN JANE and the home port "Charleston, South Carolina" on the boat's stern. He noted that it was

[1] The trial court held a hearing on the defendants' suppression motion. When it was denied defendants Demanett, O'Dell, and Gombrewicz entered a conditional guilty plea to a single count of conspiracy in violation of 21 U.S.C. § 963 (1976), reserving the right to appeal the denial of their suppression motion. *See United State* v. *Moskow*, 588 F.2d 882 (3d Cir. 1978). The remaining defendants were convicted on all counts of the indictment in a jury trial.

rigged for net trawling for fish, which was uncharacteristic of fiishing boats operating in that area, most of which trawled for shellfish with different gear. He also observed that the trawl doors were lashed in place on the deck, that the deck was clean, and that the trawling gear appeared not to have been used for a long time. From his experience Olthuis thought the 2 to 3 knot speed was uncharacteristicly slow for a fishing vessel heading to port with a catch of fish at that time of day.

Olthuis reported his observations to the Coast Guard station at Cape May, New Jersey, and redirected the POINT FRANKLIN to its original easterly heading away from the KRISTEN JANE. He reconsidered, however, and radioed a request to the Cape May station for an EPIC check on the KRISTEN JANE. An EPIC check is an inquiry to the El Paso Intelligence Center, at which federal law enforcement agencies operate a computer data bank containing information on known and suspected drug smugglers. While awaiting a response to this request Olthuis ordered the POINT FRANKLIN to reverse course and follow the KRISTEN JANE. Shortly thereafter the Cape May station informed him that the EPIC check on the KRISTEN JANE was negative. The radio conversation between the Cape May station and the POINT FRANKLIN follows:

Cape May — Coast Guard Cutter Point Franklin, this is the Group Cape May, over.

Pt. Franklin — Group Cape May, Cutter Point Franklin.

Cape May — Roger, we've checked all our (lists) we come up negative, EPIC comes up negative also.

Pt. Franklin — Roger, chief, I've just got a feeling about this guy, he's out of South Carolina, I've never seen him down in this area before. Uh, he's

a real slow ———— into Delaware Bay; uh, I don't know. I just don't know where he would be going . . .

Cape May Uh, Pt. Franklin, this is Group Cape May. If you have any doubts, why don't you go ahead and board them and see maybe you got a problem because you're proceeding so slowly.

Pt. Franklin Roger. I'll follow them into Delaware Bay. My zodiac, I can't use it yet because I don't have a lifting ———— that's on the old ———— which we're hopefully getting tomorrow, so I'm going to have to pull up along side of him and I'm going to follow him into where it's a little calmer.

Cape May Uh, roger. Keep us advised. We'll stay on 381, ————, and, uh, keep us advised of your situation.

Pt. Franklin Wilco, out.

The reference in the conversation to the zodiac, is to a small boat which would ordinarily be lowered from the POINT FRANKLIN's deck for use in boarding. Its disablement meant that a boarding would have to be made directly from vessel to vessel.

Olthuis radioed the KRISTEN JANE, identified himself as a Coast Guard officer, and without explaining his purpose, informed those manning the vessel that he intended to board. He ordered the defendants to proceed into the calmer waters of Delaware Bay. They did so, and at 6:00 p.m., after both vessels had entered more sheltered waters, Olthuis maneuvered the POINT FRANKLIN into a

boarding position relative to the KRISTEN JANE.[2] As this maneuver took place Petty Officer Cornell noticed that the name KRISTEN JANE and the home port were not permanently affixed to the vessel, but were printed on a placard hung over the stern by lines.

Olthuis ordered Petty Officers Strickland and Cornell to board the KRISTEN JANE. They did so, and were met by O'Dell and Demanett. The Petty Officers explained that they had boarded to inspect for compliance with applicable federal laws, but did not specify those laws. They asked O'Dell and Demanett whether any other persons were on board, and were told that Gombrewicz was the only other person. Strickland asked to see the KRISTEN JANE's documentation papers. Informed they were not on board, he told O'Dell he would have to look for the vessel documentation number imprinted on the main beam. Strickland also noted the absence of certain required navigational aids and safety equipment. At Strickland's request, O'Dell removed the tarpaulin covering the hold so that he could examine the main beam vessel documentation number.[3] Removing the hatch cover revealed 21,580 pounds of marijuana, filling two-thirds of the hold.

Strickland identified the substance and read O'Dell and Demanett their *Miranda* rights. Gombrewicz was brought

---

[2] The trial court made no finding as to the location of the vessel either when the order was made to proceed to calmer waters for boarding, or when the actual boarding occurred. Exhibits G-1 and G-70, in evidence at trial but not at the suppression hearing, place both events in the general vicinity of 38° 50 N, 75° 02′ W, which would be within twelve miles, but possibly beyond three miles, of Cape Henlopen, Delaware. The precise location of the vessels is not critical to our disposition.

[3] Actually the document number was located in the engine room, but there is no evidence that either O'Dell or Strickland knew this at the time of Strickland's request to enter the hold.

from the wheelhouse to the fantail where he advised Cornell that there were others on board. Seven Columbian nationals were located in the aft section of the deckhouse. All were arrested and the KRISTEN JANE was towed to Cape May.

II.

The defendants concede that once the hatch cover was opened the Coast Guard officers had probable cause to make arrests and to seize the vessel and cargo without a warrant. *See Collidge* v. *New Hampshire,* 403 U.S. 443, 466 (1971). They contend, however, that the seizure of the vessel took place when its crew was ordered by an armed Coast Guard cutter to proceed to calm waters for boarding, and that the seizure and boarding violated the fourth amendment. Thus, they urge, all the evidence of crime which came into plain view when the hatch cover was removed was the fruit of an initial unlawful search and seizure, and should have been suppressed. They contend that the seizure and boarding were invalid because the documentation and safety justifications offered by the government were pretextual and because even if those justifications were not pretextual Lt. Olthuis violated standards laid down by the Supreme Court for administrative inspections.

The trial court declined to rule on the contention that the documentation and safety inspection was pretextual. The court held that the Coast Guard has legal authority to make such inspections on any vessel, and that armed with this actual authority its additional motives are irrelevant. Because the trial court did not find the absence of a criminal investigative motive, in order to affirm we must assume, as the evidence strongly suggests, that Lt. Olthuis was seeking evidence of smuggling, and that this motivation is

irrelevant. The trial court did rule that selection of vessels for documentation inspection on the basis of a Coast Guard commanding officer's subjective hunch did not violate fourth amendment administrative inspection standards.

A.

Applicability of the Fourth Amendment

The government does not contend that the fourth amendment is inapplicable to the activities of the Coast Guard at the time and place of the order to proceed to calm waters for boarding. The trial court assumed, as do we, that it applies whether the Coast Guard action took place in the territorial waters of Delaware, in the twelve mile contiguous zone, or on the high seas. *See United States* v. *Lee,* 274 U.S. 559 (1927). Moreover, the government makes no contention that any of the defendants arrested on board the vessel lack standing to claim that the search and seizure violated the fourth amendment. We assume, as did the district court, that both the American citizens and the Columbian nationals aboard the vessel were protected by it. *See, e.g., United States* v. *Conroy,* 589 F.2d 1258, 1264-65 (5th Cir. 1979), *cert. denied,* —— U.S. —— (1980); *United States* v. *Cadena,* 585 F.2d 1252, 1262 (5th Cir. 1978); *United States* v. *Toscanino,* 500 F.2d 267, 280 (2d Cir. 1974).

B.

Coast Guard Boarding Authority

Federal statutes provide for registration of vessels engaged in foreign trade, 46 U.S.C. § 11 (1976), and for enrollment of vessels engaged in the coasting trade or fisheries. 46 U.S.C. §§ 251-52 (1976). Only United States

vessels may be enrolled, and an unenrolled fishing vessel may not, except as provided by a treaty, land its catch in a port of the United States. 46 U.S.C. § 251(a) (1976). Registration or enrollment results in documentation, and the Commissioner of Customs maintains a system of numbering documented vessels. Every documented vessel must have her number "deeply carved or otherwise permanently marked on her main beam." 46 U.S.C. § 45 (1976). The name of every documented vessel must be marked upon each bow and the stern, and the vessel's home port must be marked upon the stern. 46 U.S.C. § 46 (1976). The home port must also be shown on the register or enrollment of the vessel, which document is referred to as the vessel's "document." 46 U.S.C. § 18 (1976).

The Coast Guard is responsible for enforcement of all applicable federal laws on water subject to the jurisdiction of the United States. 14 U.S.C. § 2 (1976). That responsibility includes enforcement of the laws respecting registration or enrollment of vessels.

> The Coast Guard may make inquires, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes . . . officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. . . .

14 U.S.C. § 89(a) (1976). Obviously, the federal documentation scheme, of which the vessel's main beam number has always been a key feature, would not be enforceable

without some boarding authority. Still, as the government concedes, "the plenary authority to board and inspect, conferred on the Coast Guard by Section 89(a), must be measured against the requirements of the Fourth Amendment". Brief for Appellee at 8. For "no Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 272 (1973).

C.

Expectations of Privacy

Our first inquiry is whether by adopting a documentation scheme for identifying and controlling the trade in which vessels may lawfully engage the Congress has effectively eliminated expectations of privacy with respect to boardings for documentation and main beam number examinations. We conclude that for a vessel the size of the KRISTEN JANE, to which the documentation law applied, there was no expectation that a warrant would be required before such a boarding could take place. There are legitimate governmental interests in restricting certain activities, such as local fisheries and coasting trade, to enrolled American vessels, and the documentation scheme entails reasonable means for advancing those interests. The documentation scheme would be quite impractical absent boarding authority. Moreover, the mobility of vessels and the enormous area over which they can operate suggest that boarding frequently will take place as a result of random encounters between vessels and the Coast Guard. A warrant requirement would have been totally unfeasible when the documentation scheme was first adopted by Congress in the late Eighteenth Century. *See* Act of Sept. 1, 1789, ch. XI, § 1, 1 stat. 55. The defendants argue that today it is feasible to have a warrant issued ashore and executed on wireless instructions to the Coast Guard. But

in the context of a documentation and main beam number inspection, imposing such a warrant requirement would not add significantly to the expectations of privacy of those on board a vessel unless the requirement was accompanied by some articulable standard as to when a magistrate could authorize such an inspection. That standard would, we think, be no different than the standard applicable to the Coast Guard officer at the scene, which we address in Part II D below. We conclude that the statute authorizing Coast Guard boardings for documentation and main beam number inspections without a warrant is not facially unconstitutional. Our holding in this respect is a narrow one. We have no occasion to consider whether section 89(a) is a valid authorization for warrantless boarding for other purposes, such as safety inspections and customs enforcement. Moreover, we hold that the statute is valid only insofar as it involves the limited invasion of expectations of privacy on a vessel which are necessary for documentation and main beam number examination. It is unnecessary to go further in this case, since at the time of discovery of the contraband the search itself had not done so.

D.

Standard for Selecting Targets

The defendants contend, however, that even if boarding at sea without a warrant for documentation and main beam number inspection is in some circumstances valid, the fourth amendment still imposes limits which in this case were exceeded.

At the time the actual boarding took place the Coast Guard officers had probable cause to believe a violation of the documentation laws was occurring, since neither the name KRISTEN JANE nor the home port was permanently

affixed upon the vessel's stern. *See* 46 U.S.C. § 46. But defendants correctly point out that the apprehension for the purpose of boarding, which amounts to a seizure, took place when Lt. Olthuis ordered the KRISTEN JANE into calmer waters. At that time Lt. Olthuis had no probable cause to believe the vessel was improperly documented or identified. Moreover, there is no evidence that he was acting pursuant to any standard, guideline, or procedure promulgated by any superior authority, outlining the circumstances in which vessels could be stopped at sea for documentation verification. *See Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978). The defendants urge, therefore, that the seizure was invalid under *Delaware* v. *Prouse*, 440 U.S. 648 (1979), and *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975).

In *Prouse* the Court held that random stops of motorists for the purpose of license and vehicle registration checks violated the fourth amendment in the absence of "at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law. . . ." 440 U.S. at 663. In *Brignoni-Ponce* the Court held that random stops of vehicles in areas near the international border violated the fourth amendment, except at the border and its functional equivalents, and where the border patrol agents "are aware of specific articulable facts together with the rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." 422 U.S. at 884 (footnote omitted). If these cases apply to vessel documentation stops, the governing standard for selection of a target vessel is an articulable and reasonable suspicion of a documentation violation.

The government urges that at sea it should not have to meet even the articulable and reasonable suspicion stand-

ard. Its argument is that the alternative to random stops, a roadblock-type stop, mentioned by the Court in *Prouse* as one permissible alternative, 440 U.S. at 663, is not a practical alternative at sea. But certainly there are alternatives other than unbridled discretion. *See* Note, *High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 Harv. L. Rev. 725, 743-48 (1980) [hereinafter cited as *High on the Seas*]. This is particularly true in piloting waters such as Delaware Bay, where the movement of vessels is significantly restricted by natural barriers to navigation. We need not decide in this case, however, whether the fourth amendment permits unbridled discretion in the selection of vessels for a documentation search, for on this record, we hold, the articulable and reasonable suspicion standard is satisfied.

Lt. Olthuis observed a vessel of a size to which the documentation laws apply, with a South Carolina home port, proceeding inbound. Its speed suggested that it was not heading to port with a catch of fish. Moreover, it was headed in a direction where there were few facilities for processing fish. Its trawling gear was not of a type useful for commercial fishing in the vicinity of Delaware Bay. The trawl doors were lashed down and the rigging was in disrepair. Under these circumstances Olthuis could reasonably suspect that it might be engaged in some activity for which it was not properly documented. His selection of it, therefore, satisfied the *Prouse* and *Brignoni-Ponce* standard. He was justified in instructing the vessel to proceed to calm waters where a documentation inspection could take place. Once there, he had probable cause to believe there was a violation of 46 U.S.C. § 46.

The government urges that this seizure was justified on safety grounds as well. There is very little evidence, however, that when he instructed the KRISTEN JANE to

proceed to calm waters Lt. Olthuis had any basis for an articulable and reasonable suspicion of any safety law violation. Since, for a documentation inspection, the seizure satisfied the articulable and reasonable suspicion standard, we have no occasion to address what circumstances would justify a more intrusive safety inspection.

E.

Pretext

The defendants urge that even if the standards of *Delaware v. Prouse* and *United States v. Brignoni-Ponce* were satisfied, the plain view fruits of the documentation verification should nevertheless be suppressed because documentation verification was a mere pretext for a criminal investigative search. Given the evidence about the EPIC check and the wireless conversations between the POINT FRANKLIN and the Cape May Coast Guard Station it is clear that Lt. Olthuis' interest in the KRISTEN JANE went beyond an inquiry as to its documentation. We assume, therefore, that the interception of that vessel had at least a dual purpose. The trial court held that if the documentation verification purpose sufficed to justify the interception the criminal investigative purpose was irrelevant. We agree, at least in cases such as this one, in which the discovery of contraband is made in the course of an inspection no more intrusive of the normally concealed parts of the vessel than was necessary for such verification. The Coast Guard has responsibility for enforcement of the penal provisions of the customs law, but it also has responsibility for enforcement of the laws requiring vessel documentation. The existence of the first responsibility in no way diminishes the second, and a documentation verification inspection was made.

The defendants produced evidence in the suppression hearing of instructions issued to Coast Guard personnel to the effect that boardings for administrative inspections may often produce the opportunity for observation of concealed contraband. The evidence included typical or possible hiding places on various types of vessels, and directions that inspections for compliance with safety regulations be conducted in such a manner as to intrude into all these concealed spaces. The instruction is candid:

> As a general rule, no boarding should be conducted without the boarding officer knowing the specific purpose and authority prior to boarding the vessel. If this rule is carefully followed, most subsequent seizures of contraband when they occur should be valid and will be consistent with professional law enforcement practices. For example, as long as the Coast Guard can indicate that an initial boarding for administrative inspection was conducted in an unintrusive and unobtrusive manner, the courts are likely to sustain the initial search and any collateral searches it may have fostered.

Defendants' Exhibit DD-9 (par. 5e of Appendix III of Operation Plan). In this case that instruction was complied with up to the point at which the contraband was discovered. It is entirely possible that had the main beam number been discovered in the engine room before the hatch cover for the hold was removed the boarding officers would have proceeded with a far more intrusive bow to stern safety inspection. But such speculation about what might have been does not furnish grounds for suppression of evidence found in plain view in the course of a valid documentation verification inspection.

III.

Our holding is a narrow one. Where, as here, from circumstances such as the type and size of the vessel, the condition of its gear, its location, and its direction, a Coast Guard officer has an articulable and reasonable suspicion that the vessel may be engaged in activity for which it is not properly documented he may board the vessel for a document verification inspection. If in the course of an inspection no more intrusive than is reasonably necessary for such verification he observes contraband in plain view, seizure of the contraband is valid under the fourth amendment. Whether a more intrusive search for compliance with safety regulations or for compliance with the customs laws would be valid absent either probable cause or reasonable suspicion of violations need not be decided in this case.[4] The judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

---

[4] The legitimate scope of Coast Guard boarding authority under section 89(a) is a matter of serious debate. *Compare* United States v. Hilton, 619 F.2d 127 (1st Cir. 1980), United States v. Dominguez, 604 F.2d 304, 309 n.4 (4th Cir. 1979), *cert. denied*, —— U.S. —— (1980), United States v. Warren, 578 F.2d 1058, 1064-66 (5th Cir. 1978) (en banc), Carmichael, *At Sea With the Fourth Amendment*, 32 U. Miami L. Rev. 51 (1977), *with* United States v. Williams, 48 U.S.L.W. 2780 (5th Cir. June 3, [*sic*], 1980) (en banc), United States v. Piner, 608 F.2d 358 (9th Cir. 1979), United States v. Odneal, 565 F.2d 598 (9th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978), *High on the Seas*. The application of the holdings in Delaware v. Prouse, 440 U.S. 648, United States v. Brignoni-Ponce, 422 U.S. 873, and Marshall v. Barlow's, Inc., 436 U.S. 307, to section (89a) and other statutes such as 19 U.S.C. § 1581 authorizing customs searches presents questions of considerable complexity which should not be anticipated.

Appendix B, Judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2249

UNITED STATES OF AMERICA

vs.

DEMANETT, RONALD S.
RONALD DEMANETT,

Appellant

(D. C. Criminal No. 79-00122-01)

No. 79-2250

UNITED STATES OF AMERICA

vs.

O'DELL, PENNELL L., JR.,

Appellant

(D. C. Criminal No. 79-00122-03)

No. 79-2251

UNITED STATES OF AMERICA

vs.

GUERRERO-CHAGUAY, ERNESTO BOLIVAR,

Appellant

(D. C. Criminal No. 79-00122-04)

Appendix B, Judgment.

No. 79-2267

UNITED STATES OF AMERICA

vs.

CASTILLO-YEPES, CLEMENTE,

Appellant

(D. C. Criminal No. 79-00122-06)

No. 79-2292

UNITED STATES OF AMERICA

vs.

GOMBREWICZ, CHARLES P.
CHARLES GOMBREWICZ,

Appellant

(D. C. Criminal No. 79-00122-02)

Nos. 79-2249/51, 79-2267 and 79-2292

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: GIBBONS, WEIS and SLOVITER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on June 12, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of sentence of the said District Court filed August 20, 1979, be, and the same as hereby affirmed.

Appendix B, Judgment.

ATTEST:

SALLY MRVOS
Clerk

July 28, 1980

Certified as a true copy and issued in lieu
of a formal mandate on September 12, 1980.

Test: SALLY MRVOS

Clerk, United States Court of Appeals
for the Third Circuit

Appendix C, Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 79-2249, 79-2250, 79-2251,
79-2267 and 79-2292

UNITED STATES OF AMERICA

v.

Demanett, Ronald S., *Appellant in No. 79-2249*

O'Dell, Pennell L., Jr., *Appellant in No. 79-2250*

Guerrero-Chaguy, Ernesto Bolivar, *Appellant in No. 79-2251*

Castillo-Yepes, Clemente, *Appellant in No. 79-2267*

Gombrewicz, Charles P., *Appellant in No. 79-2292*

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by
Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

JOHN J. GIBBONS
Judge

Dated:

September 4, 1980